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Raising awareness of the benefits of mediation

The heartbreaking case of Charlie Gard saw Mr Justice Francis conclude his judgment with a plea for more use of mediation. Mr Justice Cooke, granting Peter Hook permission to continue his derivative action against his New Order ex-bandmates, nevertheless urged the parties to enter into negotiations rather than proceed to trial. Of course, the right of access to courts is 'an absolutely fundamental ingredient of the rule of law' as Lord Neuberger has highlighted, and he has made clear his view that mediation 'must not be invoked and promoted as if it was always an improved substitute for litigation'. However, he also observes 'ordinary people, average citizens, and ordinary businesses' would likely experience problems obtaining access to justice, and mediation might be particularly suitable for their legal disputes.

Having fallen out of favour since the 11th century, our legal system appears once again to be moving towards encouraging parties to mediate. The Jackson Reforms encourage parties to make realistic attempts to settle. An initial Mediation Information Assessment Meeting (MIAM) is now mandatory in the family courts. HM Courts and Tribunals Service has a small claims mediation service. The trend in the legal services sector towards fixed fees also provides incentive for lawyers to settle cases early, and our role in the mediation process itself, as lawyer or mediator, provides potential for an attractive and timely new income stream.

Research undertaken in 2012 by James Rustidge about the small claims mediation service found that 94.4% of those surveyed said they would use the mediation service again and 95.4% were satisfied or very satisfied with their opportunity to participate and express their views; 79.8% reported their cases had successfully settled. Interestingly, even among those whose cases did not settle, 85.9% said they would use the service again and 88.4% reported they were satisfied or very satisfied with their opportunity to participate and express their views. The 319 mediators who responded to Centre for Effective Dispute Resolution's (CEDR) Seventh Mediation Audit in May 2016 reported that just over 67% of their cases settled on the day, with 19% settling shortly afterwards. The UK National Family Mediation statistics suggest that over 80% of their cases reach full settlement.

The CEDR Audit estimated the mediation market in England and Wales to be around 10,000 cases in 2016, representing a market which continues to grow, albeit more slowly than anticipated; 56% of mediators who responded reported undertaking fewer than 10 mediations annually. The question arises why this market is not growing more quickly.

Research from 2007 by Paul Randolph published in the New Law Journal reminds us that personal dislike for the other side drove 47% of respondents to choose litigation; human nature must be factored in to this equation. For some, there is no substitute for a day in court. Parties will also have concerns about mediation and it may be that there is a greater need for our profession to speak out to dispel misconceptions, promote the benefits of mediation and provide validation and reassurance to the public.

It is worth exploring, then, the formal education lawyers receive about skills essential for mediation. It will only be with the introduction of the new Solicitors Qualifying Examination in 2020 that negotiation formally appears on the syllabus for students seeking to qualify as solicitors, and still it has the working title 'Advocacy/Persuasive Oral Communication'. 'Advocacy and communication skills' are on the syllabus of the Professional Skills Course. Traditionally undergraduate law programmes have favoured mooting, to develop advocacy skills, over negotiation skills; the National Student Negotiation Competition is an excellent example of the potential for change here.

Adversarial skills undoubtedly are important for lawyers, and yet no more so than listening skills and emotional intelligence, which are vital for mediation to flourish and to ensure all of our clients feel heard and understood. Raising awareness of mediation needs to start with us, given our proximity to parties in dispute. Educating student lawyers is likely to be a significant step, both in securing the future success of mediation and also in producing lawyers who are good listeners, and who appreciate the importance of, and have the skills to deal with, clients' emotions in dispute and the process of resolution.

